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DEPARTMENT OF STATE

AIRGRAM

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TO : The Amembassy, TOKYO

FROM : DEPARTMENT OF STATE

SUBJECT : Consular Convention with Japan

REF : Your A-324, September 5, 1962.

611.94A21/9-562

Tokyo A-197

The following comments relate to the matters presented by the referenced Airgram.

Article 2 (8) and 3 (1)

The Department would like to observe that the difference between Article 2 (8) and 2 (9) is that honorary consuls are included in the definition of consular officers and can never be "career consular officers". For this reason, the proposed change seems superfluous and should be rejected, since it is indicated the Japanese negotiators have no strong views on the matter. The Department would not object if, in compensation for this concession, the Japanese negotiators were informed the Department would allow the entire second sentence of Article 3 (1) to remain undeleted.

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Article 5 (2)

The Department must reluctantly oppose the Japanese proposal to achieve special protection for the consular office. Besides being open to controversy because the term "special protection" is not fully defined, and indeed ~~xx~~ not really susceptible to advance definition in all cases, the Federal-State system of the United States Government would vitiate ~~against~~ its effectiveness. Thus, a municipal level government might be unable to effectively protect the premises, while it would nevertheless undertake, to the best of its ability, the present Article 5 (2) duties. Under such a provision the sending State could maintain that it would be necessary at all times to station a policeman at the consulate entrance. It

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Contents and Classification Approved by: L/A - Warde M. Cameron

Clearances: L/T - Mr. Whittington (draft) SCS - Mr. Flaher U/PR - Mr. Mitchell (substance)
EA - Mr. Swayne A/POD/TR-Mr. Bassin (Article 6 in substance)
Maritime Commission - Mr. Peck (Protocol in substance)

would not seem appropriate to require any municipality to undertake anything approaching such a responsibility. Further, the premises might merely be leased or rented, and the lessor's interest would thereby benefit to an extent not otherwise available to him as a citizen.

Article 6 (1)

In this connection, the Embassy negotiators should refer to the definitions in Articles 2 (8) and 2 (10). The Japanese proposal would seem to be a limitation upon the Department's ability to make full and effective use of its consular officers and employees. Article 6 (1) is a temporary short-cut to the Article 4 procedures in case of death, illness, or absence of a consular officer, and the Japanese proposal would seem to preclude, for example, a Foreign Service officer with an appointment commission and Japanese recognition as a consul in one consular district from temporarily performing consular functions in another district where a personnel vacancy may temporarily exist. Other similar problems will also be foreseen. It would appear the Japanese negotiators are likening this Article to Article 15 of the ILC Consular Draft, (to be negotiated in Vienna in March of 1963) which specifically regulates only the temporary exercise of the functions of the head of a consular post. This is not the limited intent of Article 6 (1). It is not believed, either, that the ILC Convention restricts what the Japanese negotiators are attempting to accomplish by their proposed amendment. In considering the merits of the Japanese proposal, the Embassy should itself ascertain any possible disruption to its consular staffing patterns and other potential personnel problems which the amendment might cause. In the absence of a firmer justification from the Japanese negotiators, the Department would prefer Article 6 (1) to remain in its present form, for the reasons stated above. However, the Embassy is authorized to solve the matter based upon its own situation and estimate of any future problem in this connection which is apt to arise.

Article 8 (3)

The Embassy may indicate to the Japanese negotiators that there is no objection to their proposal to change the present language; "such officer" being then changed to read "consular officers and employees".

Article 11 (1) (a)

The incorporation of the Agreed Official Minute and the proposed Japanese sentence (page 5, enclosure 2, Airgram 324) is approved.

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Article 11 (5)

See the discussion on Article 14 (2).

Article 13 (3) (d)

The Department is vaguely troubled by this proposal. (Enclosure 2, page 5, Airgram 324.) While uncertain as to precisely what each term is deemed to refer to, this substitution of terms would appear to permit the Japanese to collect the "hotel and restaurant" tax from American consular officers in Japan, while the deletion would seem to relieve the Japanese consular officers from paying the "amusement tax" in the United States. (For example, 26 U.S.C. 4231, the cabaret tax of 20%, might be categorized as an "amusement tax" as well as a tax on the use of amusement facilities".) If this deletion is not the Japanese intention, they should not object to the following counter-proposal which the negotiators should make, viz., proposing that Article 13 (3)(d) read as follows:

"(d) taxes on the use of amusement facilities, the amusement tax including any hotel and restaurant tax, ..."

Article 14 (2) discussions

The definition of the term "members of his family forming a part of his household" (found on page 7, enclosure 2, Airgram 324) as an appropriately numbered paragraph of the Protocol is approved. The Japanese amendment to the second sentence of Article 11 (5) is likewise approved, although again our prerogatives appear to be narrowed somewhat. If the Embassy is concerned about the undesirability or difficulty of achieving necessary registration and permission to reside in Japan for minor children of consular personnel who are also gainfully employed, it may wish to discuss the matter further with the Japanese negotiators. If the Embassy is willing to go along with this proposed change, there is also no objection to the editing change alluded to on page 2, Airgram 324.

Article 17 (1)(e)(ii)

The substitution of the word "depositions" for "evidence" is approved. The clarification requested concerning the reference to the Japanese discussion of the Agreed Official Minute to this Article is appreciated. The Department approves deletion of the first sentence of the Agreed Official Minute to Article 17 (1) (e), and the elimination of the word "also" near the beginning of the second sentence (page 3, Enclosure 1, Despatch 284). Likewise,

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the subparagraph (a) concerning Japanese judges is approved, if the August 2, 1961 assurances (page 8, enclosure 2, Airgram 324) are supportable by the Embassy. With respect to subparagraph (b), concerning United States Commissioners, a disturbing implication may arise that by virtue of the inclusion of the sentence, a United States Commissioner would be precluded from taking depositions per se. If this in fact describes the present situation, which perhaps is hinted at by the Japanese (see the statement in the last sentence of page 9, enclosure 2, Airgram 324), there might be no objection to the use of subparagraph (b). On the other hand, the listing of the category United States Commissioners specifically might preclude other state or federal court personnel from utilizing the benefits of Article 17 (1) (e). The Department is also hesitant about approving any Article which may somehow, by implication, hinder further development of court to court judicial assistance. The negotiators should therefore propose, in lieu of the entire Agreed Official Minute, that Article 17 (1) (3) (ii) be amended to provide: "take depositions on behalf of the courts or other judicial tribunals or authorities of the sending state, voluntarily given, or" (new language being underlined).

Article 17 (1) (g)

There is no strong objection to the newly proposed Japanese subparagraph, although it appears unnecessary to so provide in a consular convention. This is one of the inherent powers exercised by a consul which does not appear to affect the receiving State -- hence it is not necessary to establish the power in a convention. If the Japanese negotiators persist in desiring this proposal, however, the Department will not consider it necessary to object.

Protocol 2

This matter will again be the subject of a separate communication.

Protocol 4

No objection to the Japanese proposal.

Further Action Desired

Perhaps the request of the Department for an official Japanese language version of the Convention was misunderstood. The Department would desire an official version, in Japanese, at the time that only full working level (i.e. Japanese and United States negotiators) agreement has been obtained. It would also be extremely helpful if, on the English language draft, an indication is given as to the particular instruction of the Department which approved any given article or part thereof.

BALL, ACTING